Supreme Court, U. S.
FILED
MAY 5 1976
MICHAEL RODAK, JR., CLERK

No. 75-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL PETROLEUM REFINERS ASSOCIATION,
ASHLAND OIL, INC.,
CLARK OIL & REFINING CORPORATION,
KERR-McGEE CORPORATION,
MOHAWK PETROLEUM CORPORATION, INC.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. EDWARD DUNKELBERGER, JR.
THEODORE L. GARRETT

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

May 5, 1976

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	4
Proceedings Before the Agency	6
The Decisions Below	8
REASONS FOR GRANTING THE WRIT	10
I. The Decision Below Which Upheld EPA Regulations Based Upon New Evidence Which Was Never Brought to the Public's Attention So As To Allow for Informed Public Participation Is Contrary to This Court's Decision in *Bowman Transportation* and Inconsistent With the Requirements of the APA and Fundamental Requirements of Due Process	11
II. The Decision Below Is Contrary to the Mandate of Congress in Holding That the Administrator Has Quasi-Legislative Power To Reach a Determination Which "Is Necessarily a Question of Policy" and Which Need Not Be Based Upon the Facts	15
III. The Decision Below Presents Important Questions As To the Proper Role of the Judiciary in Reviewing Agency Action and Conflicts With This Court's Decision in *Citizens To Preserve Overton Park*	18
IV. The Decision Below Is Inconsistent With Congressional Policy Requiring EPA To Consider Alternative Means of Limiting Lead Emissions	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Bowman Transportation Inc. v. Arkansas-Best Freight System, 419 U.S. 28 (1974) 11, 12, 13
Buckeye Power Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973) 13
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18, 19, 20
International Harvester Company v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) 13
NRDC v. EPA, D.C. Cir. No. 72-2233 (1973) 7
NRDC v. Train, 8 ERC 1695 (S.D.N.Y. 1976) 23
Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974) 13
S.E.C. v. Chenery Corp., 332 U.S. 194 (1947) 14
Train v. NRDC, 421 U.S. 60 (1975) 4

STATUTES:

Administrative Procedure Act

5 U.S.C. § 553(c) 12
5 U.S.C. § 706(2)(A) 18

Clean Air Act, As Amended

42 U.S.C. § 1857c-3 ..... 21, 22, 23
42 U.S.C. § 1857c-4 ..... 4, 22, 23
42 U.S.C. § 1857c-5 ..... 4, 21, 22, 23
42 U.S.C. § 1857c-5(a)(2)(B) 22
42 U.S.C. § 1857f-1 ..... 4, 5, 22
42 U.S.C. § 1857f-6c(c)(1) 3, 16, 17, 22
42 U.S.C. § 1857f-6c(c)(1)(A) 5, 9, 16, 18, 22
42 U.S.C. § 1857f-6c(c)(2)(A) 22
42 U.S.C. § 1857f-6c(c)(4)(C) 22
42 U.S.C. § 1857h-5(b)(1) 8

Judicial Code, 28 U.S.C. § 1254(1) 2

REGULATIONS:

37 Fed. Reg. 3882 (1972) 6
38 Fed. Reg. 1254 (1973) 7
38 Fed. Reg. 33734 (1973) 4, 8, 15, 16, 22

Page

LEGISLATIVE MATERIAL:

H. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970) 17

S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970) 17

116 Cong. Rec. 19230 (1970) 17
116 Cong. Rec. 32920 (1970) 22
116 Cong. Rec. 32921 (1970) 17

Cong. Research Service, A Legislative History of The Clean Air Amendments of 1970 (1974) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

NATIONAL PETROLEUM REFINERS ASSOCIATION,
ASHLAND OIL, INC.,
CLARK OIL & REFINING CORPORATION,
KERR-McGEE CORPORATION,
MOHAWK PETROLEUM CORPORATION, INC.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Petroleum Refiners Association *et al.* pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia in this case.

OPNION BELOW

The opinion of the court of appeals below, on rehearing *en banc,* is unofficially reported at 8 E.R.C. 1785 and is reprinted in the Appendix to this Petition.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1976. Issuance of the mandate of the court of appeals has been stayed pending the filing of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The regulations at issue involve fundamental questions concerning the use of the nation's limited petroleum supplies. The use of lead additives in gasoline is of paramount importance to the refining industry. The split decision below, reversing a decision of a panel of the court of appeals, upholds EPA regulations limiting lead usage based upon an admittedly speculative health concern that is said to be essentially unreviewable by the courts. The questions presented are:

1. Whether the Administrator of the Environmental Protection Agency, acting under the command of the court of appeals to complete his action within thirty days, satisfied the requirements of due process and the Administrative Procedure Act where interested persons were not provided notice of and an opportunity to comment on new evidence that was

[1] This Appendix is also submitted as the joint appendix in four related petitions. All five cases involved the same regulations and were jointly decided in the opinion below.

relied on by him in determining that emission products of lead additives in gasoline will endanger the public health.

2. Whether authority has been delegated by Congress to the Administrator to limit the use of lead additives in gasoline on the basis of a policy judgment even though the available scientific and medical evidence is speculative and inconclusive as to the effect of such additives on the public health.

3. Whether appellate review of administrative agency rulemaking that is based upon scientific and medical evidence requires examination of the evidence relied upon by the agency or is satisfied by a determination that the agency received and gave consideration to such evidence.

4. Whether, in any event, it was an abuse of discretion for the Administrator to impose nationally uniform limitations on the lead content of gasoline, instead of establishing ambient air quality standards and providing for regional controls.

STATUTES AND REGULATIONS INVOLVED

Section 211(c)(1) of the Clean Air Act, as amended, ("the Act"), 42 U.S.C. § 1857f-6c(c)(1), grants the EPA Administrator certain authority to control the sale of any fuel additive which has emission products that will endanger the public health, as follows:

> "(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle

engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare. . . ."

"(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 1857f-1 of this title."

The regulations involved, "Regulation of Fuels and Fuel Additives, Control of Lead Additives in Gasoline," were published in 38 Fed. Reg. 33734 (December 6, 1973) (R. 1) [2]

STATEMENT OF THE CASE

The principal means by which the Clean Air Act, as amended in 1970, provides for the protection of public health and welfare from the harmful effects of air pollution is the promulgation of national ambient air standards by EPA under Section 109 of the Act, and the adoption under Section 110 of state implementation plans providing for attainment and maintenance of the standards by such means as emission limitations for stationary and moving sources, and land use and transportation controls.[3]

The Act contains supplementary provisions specifically directed at automotive emissions. The preferred methods of control, as expressed by Congress, are di-

---

[2] References to "R" are to the record as set forth in the Joint Appendix below.

[3] 42 U.S.C. §§ 1857c-4, 1857c-5; *see* Train v. NRDC, 421 U.S. 60, 66-67 (1975).

rect limits on vehicle emissions to be met by auto manufacturers under Section 202 of the Act.[4] A different means of control is provided in Section 211(c)(1)(A) of the Act, involved here, which grants EPA certain authority to control the sale of fuel additives if it finds on the basis of medical and scientific evidence that emission products of such additives "will endanger" the public health.[5]

The lead additives which are the subject of the regulations at issue in this case are of paramount importance to the refining industry. The use of lead additives enables refiners to increase the yield of gasoline, at a given octane, which is produced from a quantity of crude oil. It also permits refiners to produce gasoline of desired octane levels with a minimum of refinery and processing equipment. The regulations at issue will have an adverse impact upon the nation's energy crisis, and will result in substantial increases in crude oil usage.[6] The regulations will also result in huge added production costs which will be borne by the consuming public and the refining industry,[7] and

---

[4] 42 U.S.C. § 1857f-1.

[5] 42 U.S.C. § 1857f-6c(c)(1)(A).

[6] EPA estimated an increase of between 102,000 and 351,000 barrels per day crude oil usage by 1985 (R. 1538-39). The Department of the Interior estimated an increase of one million barrels per day (R. 2494), and the Department of Commerce projected even higher figures. (R. 2459).

[7] EPA estimated increased consumer costs from $14 to $75 million by 1980, and additional annual investment costs of $82 to $113 million by 1980 (R. 1542-43). The Department of the Interior estimated consumer costs of over $48 billion in this decade (R. 2498).

will have a particularly severe impact on smaller refiners.[8]

Proceedings Before the Agency

On February 23, 1972, the Administrator proposed regulations affecting the use of lead additives in gasoline.[9] These proposed regulations would have required a four-stage reduction of lead in gasoline to 1.25 grams per gallon by 1977. The reduction portion of the proposed regulations was based upon an EPA health paper entitled "Health Hazards of Lead," which accepted a certain relationship between air and blood levels, and made assumptions about the volume of air inhaled by a person.[10] Public hearings were held by EPA on the proposed regulations in Washington, D. C., Dallas and Los Angeles in the spring of 1972.[11] Much of the testimony at the hearings and many of the written comments received by EPA were critical of the proposed regulations and EPA's scientific assumptions.[12]

In the light of these criticisms and subsequent public comments received, on January 10, 1973, EPA announced reproposed regulations which would require a four-stage reduction of lead in gasoline to 1.25 grams per gallon by 1978. The basis for the new proposal was that the Administrator had "re-evaluated" his position and concluded that "it is difficult if not im-

---

[8] EPA consultants predicted that a number of small refiners would close as a result of the regulations. R. 1592, 1674-78, 1653.

[9] 37 Fed. Reg. 3882-84 (1972) (R. 22).

[10] R. 292, 295-96, 254, 272.

[11] R. 1970-2116.

[12] R. 2022-69, 2245, 2070.

possible to rely on the analysis presented in the earlier proposal" and that "the original health position can no long[er] be considered sufficient." [13] The reproposed regulations were accompanied by a second health document summarizing EPA's "new health position" [14] which was based upon the assertion that "considerable numbers" of people have elevated blood lead levels, and that emissions from automobiles contribute thereto.

EPA invited public comment for 60 days on the reproposed regulations, and in response to this request, extensive comments criticizing the new EPA position and its supporting health document were received, including comments from other government agencies. On October 29, 1973, while EPA was considering these comments and certain other new data which it had received, the agency was required by the court of appeals, in dismissing a premature petition for review, to reach a final decision on the matter within 30 days.[15]

In response to the court's order, EPA on November 28, 1973, announced that the Administrator had decided to promulgate in revised form final regulations to reduce lead levels in gasoline.[16] The final regulations, published in the Federal Register on December 6, 1973, provided for a five-stage reduction in the amount of lead in gasoline to an average lead content

---

[13] 38 Fed. Reg. 1258 (January 10, 1973) (R. 15).

[14] This second health document was entitled "EPA's Position on the Health Effects of Airborne Lead—November 29, 1972." (R. 158).

[15] Natural Resources Defense Council, Inc. v. Environmental Protection Agency (D.C. Cir. No. 72-2233) (unpublished order). *See* Wright Op. 14.

[16] R. 1143.

of 0.5 grams per gallon over a period of five years. The regulations were accompanied by a preamble [17] which refers to new technical documents relied upon to justify the regulations, including a third lengthy health position paper.[18] Prior to the promulgation of these regulations, EPA did not provide interested parties with notice of or an opportunity to comment either on the new health document upon which the agency based the regulations, or the new scientific and medical evidence upon which the agency had heavily relied.

The Decisions Below

Petitions for review of the final regulations were filed by these petitioners and others pursuant to Section 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1). Petitioners argued that the regulations should be held unlawful and set aside on several grounds. First, we argued that EPA's health concern is speculative and that the evidence could not support the conclusion, required by the statute, that the use of lead additives "will endanger the public health." Petitioners also argued that the regulations should be remanded for an opportunity to comment on the new evidence relied upon by EPA. Further, we argued that EPA's failure to consider alternative means of limiting automobile emissions rendered these regulations invalid.

A divided panel of the court of appeals issued its decision setting aside the regulations on January 28, 1975. The majority opinion by Judge Wilkey, in which Judge Tamm joined, found the regulations defective

---

[17] 38 Fed. Reg. 33734 (1973) (R. 1).

[18] "EPA's Position on the Health Implications of Airborne Lead," November 28, 1973 (R. 27).

on the independent grounds that EPA incorrectly interpreted Section 211(c)(1)(A) of the Act, and that the Administrator's decision "reflected a clear error of judgment upon the available evidence." (Panel Op. 69). Judge Wright filed a lengthy dissent which criticized the "rigor of the majority's review," and what he viewed as its undue sensitivity to "the energy crisis." (Wright Diss. 94).

EPA thereafter successfully petitioned for rehearing *en banc*. The court ordered that supplemental briefs be filed, the case was argued in May 1975, and on March 19, 1976 the court rendered a deeply divided (5 to 4) decision affirming the regulations. This time Judge Wright wrote the principal opinion for the majority, and Judge Wilkey wrote a dissenting opinion in which Judges Tamm and Robb joined. In addition, separate concurring opinions were filed by Judges Bazelon and Leventhal, and a separate dissent was filed by Judge MacKinnon.

Judge Wright's opinion held (1) that the Administrator properly interpreted Section 211(c)(1)(A) to allow him to make "an essentially legislative policy judgment, rather than a factual determination" (Wright Op. 37, 46); (2) that the court need not decide whether the Administrator's decision is supported by substantial evidence, but only whether it has a rational basis in evidence (*id.* at 74-75); and (3) that EPA's procedures in failing to provide for comments prior to issuing the final regulations did not violate the APA or due process. (*Id.* at 98, 110).[19]

---

[19] Judge Wright's opinion also rejected other arguments raised by petitioners in challenging the validity of the regulations. (Wright Op. 110, n. 24).

In a separate opinion in which Judge McGowan joined, Judge Bazelon stated that substantive review of scientific issues by the courts "is dangerously unreliable," but concurred only because in his view the majority's "legislative policy" holding would bar a "close analysis of the evidence." (Bazelon Op. 4).

The principal dissenting opinion by Judge Wilkey concluded, contrary to the majority, (1) that even accepting EPA's interpretation of the statute, the agency's "analysis reflected a clear error of judgment upon the available evidence" (Wilkey Op. 85), (2) that the requirements of the APA and due process were not satisfied because EPA did not bring to the public's attention the new scientific data upon which it relied in a manner that made informed public comments possible (*id.* at 32, 86), and (3) that a reviewing court cannot supply reasons absent from the agency's formal explanation, and must engage in a "substantial inquiry" to consider whether the agency's decision was based upon a consideration of relevant factors and whether there was a "clear error of judgment." (*Id.* at 58, 65).[20]

REASONS FOR GRANTING THE WRIT

The granting of the petition for certiorari in this case is supported by several of the grounds that are traditionally deemed sufficient by this Court to justify plenary review. The majority opinion expressly recognized the "importance of the issues raised" (Wright Op. 113), and it is clear that the questions presented by the deeply divided opinions in this case raise issues of national and continuing importance concerning the

[20] Judge Wilkey did not find it necessary to reach the other arguments presented by petitioners. (Wilkey Op. 85, n. 194).

procedures for public participation in agency rulemaking, the role of the courts in reviewing agency action, and the implementation of the Clean Air Act. This case also raises important questions concerning the use of the nation's limited petroleum supplies.

I. The Decision Below Which Upheld EPA Regulations Based Upon New Evidence Which Was Never Brought to the Public's Attention So as To Allow for Informed Public Participation Is Contrary to This Court's Decision in Bowman Transportation and Inconsistent with the Requirements of the APA and Fundamental Requirements of Due Process.

The absence of an opportunity for comment on the data which formed the basis for the final regulations, and the resulting due process and APA issues raised thereby, deeply divided the court below. The regulations involved here were twice proposed, and were twice the subject of extensive criticism by other government agencies and the public which persuaded EPA that its hypotheses could not be supported. Despite the fact that these uncertainties were expressed by the agency itself in promulgating the final regulations, as the dissent notes, EPA "did not risk the same fate with the Third Health Document." (Wilkey Op. 16). Instead, in response to a court order that EPA act within thirty days, the agency rushed into an ill considered decision based upon a new health document and new scientific data.

The "majority" opinion by Judge Wright (one of the judges who had ordered action within thirty days) held that the requirements of the APA and due process were satisfied because, as reconstructed by the majority, the agency's general "theories" (but not the data relied upon) were the same in the Third Health

Document, because some of the underlying scientific data were placed in the agency's public information file, and because the remaining data (according to the majority) were not needed to support EPA's conclution or were merely a reexamination of earlier data. (Wright Op. 98-99, 104-08). In contrast, two concurring judges (Bazelon and McGowan) felt that there was a "failure of the record to clearly disclose the procedural steps followed by EPA," and stated that "ordinarily" there should have been "a remand for clarification" except for the possibility that the court of appeals' "thirty-day order interfered with the opportunity to do so." (Bazelon Op. 4-5).

The four dissenting judges concluded that the requirements of the APA and due process were not complied with, and that the majority was guilty of sanctioning a departure from "the usual rules" because "this is an environmental case." (Wilkey Op. 50). The dissent specifically concluded that making certain information available to a party as a result of a FOIA suit, and placing information in a public file without providing any notice as to which data would be relied upon rendered the opportunity to comment effectively "farcical." (*Id.* at 47).

The lack of an opportunity to comment on EPA's new health documents and supporting data is totally inconsistent with an orderly administrative proceeding. The Administrative Procedure Act requires that an Agency provide notice of and "an opportunity to participate in the rule making through submission of written data, views, or arguments . . ." 5 U.S.C. § 553 (*c*). The importance of the right to comment on evidence in an administrative proceeding was emphasized by this Court in *Bowman Transportation Inc.* v.

Arkansas-Best Freight System, 419 U.S. 281, 288 n. 4 (1974):

> "A party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in any way that forecloses an opportunity to offer a contrary presentation."

The decision below is in conflict not only with this Court's decision in *Bowman Transportation, supra,* but also with previous stated positions of the court of appeals, and decisions in other circuits.[21]

In this case, a request for an opportunity to comment on the new basis for the regulations by one of the petitioners was denied by EPA in a letter dated after the regulations were promulgated. (*See* Wilkey Op. 37). Perhaps, as Judge MacKinnon noted, given the time constraints imposed on the agency by the thirty-day order, "it was impossible for it to comply with the notice and comment requirements of the Administrative Procedure Act . . . ." (MacKinnon Op. 1). If allowed to stand, however, this case would sanction a wide departure from this Court's decision in *Bowman Transportation* and previous cases interpreting the requirements of the Administrative Procedure Act. As noted by the dissent, "[i]n no previous case, environmntal or otherwise, has this court tolerated such 'public no-

---

[21] *See* International Harvester Company v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974); Buckeye Power Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973).

tice' and 'opportunity to comment' as it sanctions here." (Wilkey Op. 50).

There is a related aspect of the decision below which warrants review by this Court. As noted by Judges Bazelon and McGowan, there is a "failure of the record to clearly disclose the procedural steps followed by EPA." (Bazelon Op. 5). It is clear that the majority's conclusions as to the procedure followed by EPA were not set forth by EPA, but were rather reconstructed by the court.[22] This reconstruction not only consisted of examining the factual record, but of evaluating the scientific significance of data to determine whether its unavailability was prejudicial,[23] and filling in gaps in the record and EPA's explanation thereof, far beyond any reasonable discernment thereof, as the dissent makes clear.[24] In doing so, the majority violated this Court's admonition that the courts cannot supply *post hoc* rationalizations for agency action. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).[25]

Review by this Court is essential to make it clear to administrative agencies and reviewing courts that agencies cannot be permitted to base regulations upon material that was never brought to the public's attention in a manner that makes informed public comment possible.

---

[22] *See* Wright Op. 97-110.

[23] *See e.g.* Wright Op. 104 n. 112; compare Wilkey Op. 28, n. 62.

[24] *See* Wilkey Op. 17-50.

[25] *See also* cases cited in Wilkey Op. 65, n. 140.

II. The Decision Below Is Contrary to the Mandate of Congress in Holding that the Administrator Has Quasi-Legislative Power To Reach a Determination Which "Is Necessarily A Question of Policy" and Which Need Not Be Based Upon the Facts.

In promulgating the lead health regulations the Administrator has not purported to base them upon a factual determination that the emission products of leaded gasoline "will endanger the public health or welfare." Indeed, EPA expressly concludes that the percentage of total lead exposure from automobile emissions cannot be determined, that the *primary* causes of lead exposure are *not* automotive emissions but rather are ingestion of lead-based paint in the case of urban children and ingestion of food in the case of the general population, and that "the contention that lead contamination of dust and dirt by automotive emissions is a significant source of lead exposure" is simply "a *hypothesis*" which is not supported by data "to conclusively prove or disprove the hypothesis."[26] EPA admits that it is "difficult to determine what impact would be achieved by partial or total reduction of lead from any one source." At best, EPA's action is premised on its puzzling conclusion that "it would be prudent to reduce preventable lead exposure" and that since leaded gasoline is a source of lead which can be

---

[26] 38 Fed. Reg. 33735-36 (1973) (R. 3-4) (emphasis added). Neither the Administrator nor the EPA health document has taken the position that the evidence relating lead in gasoline to human health is reasonably definitive or that further information is not required. Explanations such as "a hypothesis", "preliminary data show", "not all links in the argument have been established beyond dispute," "failure to find consistent correlations" and "further information is required" occur throughout the preamble to the regulations and the final health document. (R. 2, 3, 1478, 4, 123).

"readily" controlled by EPA "in comparison to other sources" the agency felt obligated to do so.[27]

The majority opinion concedes that "hard proof of any danger caused by lead automotive emissions has been hard to come by" (Wright Op. 9), but upheld the Administrator's action based upon its decision that the determination of endangerment to public health "is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." (*Id.* at 46). In support of this conclusion, the majority attempts to make a virtue of necessity by arguing that EPA action based on "speculation, conflicts in evidence and theoretical extrapolation" should be upheld. "How else can they act, given a mandate to protect the public health but only a slight or nonexistent data base upon which to draw?" (*Id.* at 47).

The majority's question is not a rhetorical one. As the dissent persuasively demonstrates, the court's holdings flies in the face of the fact that the "will endanger" standard is not a delegation of quasi-legislative power, and that Congress intended EPA's determination under Section 211(c)(1)(A) to "be a reasoned factual determination based solely on the medical and scientific evidence." (Wilkey Op. 55).

When Congress enacted Section 211(c)(1) of the Clean Air Act,[28] it realized that the authority to regulate gasoline and its additives posed complex and important questions concerning this country's use of one

[27] 38 Fed Reg. 33734 (R. 2).

[28] 42 U.S.C. § 1857f-6c(c)(1).

of its most vital natural and economic resources, the proper uses of which have become even more acute with the recent energy crisis. Accordingly, Congress expressly required that before the Administrator exercise his authority under section 211(c)(1) of the Act, he would have to make a determination based on "consideration of all relevant medical and scientific evidence available to him," that the use of an additive "will endanger the public health. . . ." Congress did not have in mind the speculative and hypothetical health effects which the Administrator relied upon in the preamble to the regulations and in the new health document. The Senate and House Reports emphasized that there would have to be "a *direct* endangerment to the public health," and that any standards established would have to be based on a consideration of all of the medical and scientific evidence.[29]

The split decision below has potential significance far beyond the particular statutory provisions involved. EPA took the step of requesting a rehearing because the agency felt that it was important to establish the principle that the Administrator not be required to act upon "the type of evidence" required by the original panel. (EPA Supp. Br. 6). The decision

---

[29] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 34 (1970) (emphasis added); H. R. Rep. No. 91-1146, 91st Cong., 2d Sess. 13 (1970). The Chairman of the House Committee which reported the bill, Representative Staggers, stated that the Administrator could control additives "[i]f he has the facts, and he has proven this by facts, that they are a danger and poisonous." 116 Cong. Rec. 19230 (1970) (emphasis added). And Senator Baker, ranking minority member of the Conference Committee, stated that controls could be adopted only if the Administrator found that the combustion of a given fuel "was, *in and of itself*," an endangerment of the public health. 116 Cong. Rec. 32921 (1970) (emphasis added).

below in accepting EPA's argument raises the converse issue, namely whether where Congress has expressly required, as it has in Section 211(c)(1)(A), that a determination be based on a "consideration of all relevant medical and scientific evidence," agency action can validly be grounded upon a "nonexistent data base" and vague considerations of "policy." Congress could have provided for an EPA determination based upon "policy", but it did not do so. This Court should make it clear that the courts in reviewing agency action cannot substitute their views for the express mandate of Congress as to the weight to be given policy considerations as opposed to scientific facts relating to health and safety.

III. The Decision Below Presents Important Questions as to the Proper Role of the Judiciary in Reviewing Agency Action and Conflicts with This Court's Decision in Citizens To Preserve Overton Park.

The absence in the record of any support for a determination that lead emissions from automobiles are a danger to public health compels the conclusion that the majority of the court below could not have subjected that determination to the statutory standard of judicial review required by the Administrative Procedure Act and decisions of this Court. That standard requires a reviewing court to hold unlawful and set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The applicable test was discussed at length in this Court's decision in *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). There the Court emphasized that an agency's determination must be subjected to a "thorough, in-depth review" by "engag-

[ing] in a substantial inquiry" and "review[ing] the whole record." This Court made it clear that although "[t]he court is not empowered to substitute its judgment for that of the agency," the "inquiry into the facts is to be searching and careful," and in every case the court must determine whether "the decision was based on a consideration of relevant factors." *Id.* at 415, 419, 416.

The five-man majority in the court below was itself deeply divided on this fundamental issue of the role of the court in reviewing action of the Administrator under the Clean Air Act. Judge Wright's definition of this standard of review on pages 66-74 of his opinion for the most part indicates that he at least undertook a "close scrutiny of the evidence" (Wright Op. 72), but his extensive discussion in footnote 74 at page 69 of his opinion appears to be nothing less than a rejection of the "clear error of judgment" language of this Court in its *Overton Park* decision. Further, Judge Wright refused to give significance to the fact that the Conference Committee on the Clean Air Act eliminated the provision in the Senate-passed version which would have provided an express presumption of validity for action of the Administrator in promulgating regulations.[30]

This uncertainty on the part of Judge Wright in reconciling his approach to the administrative record in the light of the Clean Air Act and its legislative history, as well as the decision of this Court in *Overton Park*, is compounded by the fact that two members

---

[30] Wright Op. 68 n. 72. *See* Cong. Reserach Service, A Legislative History of the Clean Air Amendments of 1970 (1974), Vol. 1 at 386, 149.

of the majority explicitly refused to accept even Judge Wright's approach in reviewing the record. The concurring opinions of Judges Bazelon and McGowan, expressly reject the notion that appellate judges should steep themselves in technical matters "to determine whether the agency has exercised a reason discretion." (Bazelon Op. 1). Instead, these two Judges, which were essential to the majority, concurred in the decision only because as they "read the court's opinion, it severely limits judicial weighing of the evidence by construing the Administrator's decision to be a matter of 'legislative policy,' and consequently not subject to review with the 'substantive rigor proper for questions of fact' " since "this result would bar the panel's close analysis of the evidence. . . ." (*Id.* at 4).

As a result of the confusion as to the proper scope of substantive review of agency action under the Administrative Procedure Act and this Court's decision in *Overton Park,* a bizarre result has been reached. The concurring opinion of Judges Bazelon and McGowan indicates that they did not find it necessary to engage in a close analysis of the evidence. As a result, only three of the five judges in the majority were able to form any conclusion as to the adequacy of the evidence relied upon by the Administrator. On the other hand, four dissenting judges found that "no valid administrative procedure would countenance launching an enterprise drastically affecting a substantial portion of our economy on such a shaky foundation as that relied upon in this case." (Wilkey Op. 35). Review by this Court is essential to eliminate the uncertainty which the court of appeals found in applying this Court's decision in *Overton Park,* as that deci-

sion applies to all agency action based upon scientific and technical evidence.

IV. The Decision Below Is Inconsistent with Congressional Policy Requiring EPA To Consider Alternative Means of Limiting Lead Emissions.

In promulgating these regulations, the Administrator attempted to deal with what he perceived to be a problem involving the emission products of lead additives in gasoline by imposing national, uniform limitations on the lead content of gasoline. In deciding on this course of action, the Administrator expressly rejected an alternative approach of providing for regulation on a regional basis under Section 108 of the Clean Air Act. 42 U.S.C. § 1857c-3.

The Administrator's failure to consider air quality standards for lead has great significance. In the preamble to the regulations the Administrator concededly was concerned with air lead levels only in certain urban areas. (R. 15-16). It is therefore impossible to justify the Administrator's adoption of nationwide rather than regional controls. Under this statutorily preferred approach, EPA would have published an ambient air quality standard for lead, which would be made effective by the adoption of implementation plans by the states pursuant to Section 110 of the Act. In those regions of a state where airborne lead could be shown to result in ambient air levels in excess of the standard, the state implementation plan could prescribe emission limitations and "transportation control measures" as necessary to achieve the standard in those regions. Such measures can include limitations on vehicle use, parking controls, emission limitations for vehicles, requirement of lead traps on individual

vehicles, or even controls on the use of lead in gasoline sold in the region or state.[31]

The failure of the Administrator adequately to consider this alternative means of control renders his decision to promulgate regulations under Section 211 an abuse of discretion in view of the admittedly speculative and inconclusive nature of the available health evidence, and the fact that the amount of lead in the atmosphere concededly varies widely from region to region.

No explanation was offered for the Administrator's rejection of the air quality standard and regional approach under Sections 108-110, other than the Administrator's assertion that the choice between these regulatory approaches is "discretionary with the Administrator."[32] The Administrator's conclusion on this point is inconsistent with both the language of Section 108, and the Congressional mandate that means other than the control of fuel additives be given preference by EPA. As recognized by the majority opinion below, when EPA acts under Section 211(c)(1)(A) "it is essentially telling manufacturers how to make their fuel, a task Congress felt the Agency should enter upon only with trepidation."[33] Congress made its preference for alternate means of controls clear by expressly providing that before EPA exercises its Section 211 authority, it must first consider "other technologically or economically feasible means of achieving emission standards" under Section 202. 42 U.S.C. § 1857f-6c(c)(2)(A).

---

[31] *See* 42 U.S.C. § 1857c-5(a)(2)(B). Section 211(c)(4)(C) provides that state fuel additive limitations can be approved (or promulgated by the Administrator) only if "necessary" to meet a national ambient standard. 42 U.S.C. § 1857f-6c(c)(4)(C).

[32] 38 Fed. Reg. 33740 (R. 8).

[33] Wright Op. 16 n. 14; *see* 116 Cong. Rec. 32920 (1970).

The Administrator's conclusion concerning Section 108 of the Act not only ignores this Congressional preference, but also is based on an erroneous legal premise. According to the majority opinion, the Administrator had claimed, "with some statutory support, that action under Section 108 is discretionary with him." (Wright Op. at 110-11, n. 124). The Administrator's conclusion on this point is inconsistent with the language of Section 108, which does not confer discretionary authority, but which instead provides that if a substance has an adverse effect on public health and the other criteria of the statute are met, the Administrator "shall" issue ambient air quality standards. The conclusion of the majority below is directly in conflict with a recent decision of the United States District Court for the Southern District of New York, which held that in view of the Administrator's health position, EPA was required to take action under Sections 108-110 to deal with automobile lead, and that this was not a matter of discretion.[34] Review by this Court is thus warranted to re-

[34] NRDC v. Train, 8 E.R.C. 1695 (S.D.N.Y. 1976).

solve the conflicting positions taken in different circuits regarding this important matter.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

H. EDWARD DUNKELBERGER, JR.
THEODORE L. GARRETT

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

May 5, 1976

see

75

1602

1612

1613